Supreme Court, U.S.
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No. 10-

In the Supreme Court of the United States

Michael Joseph Singleton,
Petitioner,

v.

State of California,
Respondent.

On Petition for Writ of Certiorari to
The California Court of Appeal
(Second Appellate District, Div. 4)

Petition for Writ of Certiorari

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QUESTION PRESENTED

Does *Kastigar v. U.S.*, 406 U.S. 441 (1972) require *de novo* review of the trial court decision that trial testimony of a witness who took statements from a public employee under the protection of *Garrity v. New Jersey*, 385 U.S. 493 (1967), was "wholly independent" of the *Garrity* immunized statements?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Joseph Singleton respectfully prays for a writ of *certiorari* issue to review the judgment of the California Court of Appeal, Second Appellate District, Division Four.

OPINION BELOW

The published decision affirming petitioner's conviction (App. 49) was filed on February 22, 2010. It is reported at 105 Cal.Rptr.3d 628. Appendix [App.], 1-48. On March 10, 2010, the Court of Appeal denied a petition for rehearing. App. 50. On June 22, 2010, the California Supreme Court denied petitioner's petition for review. App. 51.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1) to review the above cited judgement.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V: "No person shall be...compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...."

REASONS FOR GRANTING CERTIORARI

Petitioner Michael Joseph Singleton seeks review of an important constitutional question involving this Court's protective remedies provided in *Kastigar v. U.S.,* 406 U.S. 441 (1972) as applied to prosecution use of a witness who took immunized statements under the protection of *Garrity v. New Jersey,* 385 U.S. 493 (1967). This case concerns the

rights of a police officer[1] and the manner in which the California Court of Appeal misapplied *Kastigar's* remedial protections to permit a criminal trial featuring a prosecution witness who previously had taken petitioner's immunized statement in an internal affairs investigation.

In California, as elsewhere, public safety officers are required to submit to compelled interviews during departmental internal affairs (IA) investigations. Here, during such an internal investigation of an injury to an arrestee (Bernal), an IA investigator (Weldon) interviewed petitioner, the arresting officer, after promising no use would be made of his statements outside the IA investigation. App., 12-13. That promise was breached when the IA investigator testified at trial on matters that related to his IA investigatory conclusions. No remedy was provided when petitioner sought the intervention of the trial court and then the Court of Appeal to preclude the investigator's testimony.

Petitioner was put on trial for excessive force resulting in an alleged assault and filing a false report. The facts pertain to petitioner's effecting a lawful arrest of Bernal, a long-time petty criminal, and the injury to Bernal as he and petitioner were moving toward the jail entrance. Petitioner's first jury trial ended with the jury divided 9-3 in favor of acquittal. For the second trial, the prosecution elected to call a "use of force" expert and chose for

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[1] The California Peace Officers' Research Association of California (PORAC) Legal Defense Fund filed amicus briefs in support of petitioner in both the California Court of Appeal and in support of his petition for review in the California Supreme Court.

this role the IA investigator, Weldon, who years before had taken the compelled statement from petitioner and issued a report.

Weldon opined at the criminal trial on one or more of the same issues he had investigated and reported during his IA investigation. Petition-er objected and demanded a *Kastigar* hearing (1CT 138-149) which was held outside the presence of the jury. Weldon admitted that he took everything into consideration in forming his opinions about the matter. Necessarily, this included the compelled statements from petitioner. The trial court instructed him that his trial testimony must not rely on anything but his prior police experience and what he saw on a video tape of petitioner and Bernal moving toward the jail door moments before the alleged assault incident. Weldon stated he would do so and was permitted to testify.

Weldon's testimony was the only substantive difference between the first hung jury favoring acquittal in which Weldon did not testify, and the second trial which resulted in a guilty verdict.

Petitioner raised the Kastigar issue on appeal. The Court of Appeal (hereafter cited as the "Opinion" or "Opn." and cited in App., pp. 1-48) mangles the law under *Kastigar* in multiple legal and factual ways that will work mischief in future cases.

First, it does not adopt and apply the *de novo* standard of reviewing the constitutional issue of whether the prosecution proved Weldon's testimony was "wholly independent" of the compelled statements he took from petitioner. Instead, the Opinion states that if the trial court cited the correct legal principle (*Kastigar*), a deferential

standard of "substantial evidence" is to be applied (App., at 15-15) citing *U.S. v. Koon,* 34 F.3d 1416, 1433 (9th Cir. 1994), that findings are reviewed for clear error. As a result of applying this deferential standard, the Opinion sweeps away the numerous legal and factual bases for finding a *Kastigar* taint from using a witness who took the immunized statements.[2]

The review standard of this issue is *de novo* because the constitutional issue is a mixed question of constitutional law and historical fact warranting plenary appellate review. Whether the prosecution proved Weldon's trial testimony was "wholly independent" of the compelled statements he took from petitioner is not a matter of "plain error" as the Opinion erroneously states. App., 16.

Second, given the use of the wrong standard of review, the Opinion's factual errors become understandable, but erroneous. Thus, resolution of the taint issue cannot simply be premised on the trial court instruction that Weldon rely only on the video and his police experience in giving testimony. Given that his testimony tracked his previous opinions during his prior IA investigation, such a feat of mind erasure is not humanly possible. He admitted as much in his testimony. His inevitable acquiescence to the court's instruction was mere lip service given to meet the requirement that his testimony be "wholly independent" of the

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[2] The Opinion was "troubled by the prosecutor's decision to create the potential for such [*Kastigar*] error by electing to call the witness who had taken appellant's compelled statement." App. 23, n. 9.

immunized statements he had taken.

The prohibition on the use of compelled statements bars its use even as an investigatory lead or in prosecutorial strategic consideration. The prosecutor had the statement and sent a redacted version to Weldon, thus demonstrating direct use of the compelled statement. The Opinion erroneously overlooks the testimony concerning this by saying, "there is no suggestion that the prosecution itself had any contact with appellant's compelled statement or knew its contents." App., 16.

What occurred at petitioner's trial undermined the constitutional protections put in place by this Court in *Garrity* to protect officers from the use of involuntary, compelled IA statements by permitting their IA interrogators to serve as witnesses against them at subsequent criminal trials.

Certiorari should be granted to provide the constitutional remedy mandated by this Court's safeguard put in place by *Garrity*. As this Court stated in *Minnesota v. Murphy,* 465 U.S. 420, 435 fn. 7 (1984):

> Our cases indicate, moreover, that a State may validly insist on answers to even incriminating questions... as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination.

That constitutional protection will not survive under a review standard that is far too deferential to a trial court's ruling.

STATEMENT OF FACTS

A. Procedural History. On September 4, 2007, petitioner, Michael Joseph Singleton, was arraigned on an information charging him in two counts: Calif. Penal Code § 149 (assault under color of authority) and Penal Code § 118.1 (filing a false police report). 1CT 32-34.[3] The incidents were said to have occurred on May 13, 2004.

The case was called for the first jury trial on January 16, 2008. 1CT 52. On January 28, 2008, the jury commenced deliberating. 1CT 73. On January 30, 2008, the jury reported it was hopelessly deadlocked 9 to 3 in favor of acquittal. 5RT 2406. A mistrial was declared. 1CT 75.

A second jury was impaneled June 2, 2008. 1CT 156. On June 17, 2008, the jury began deliberations. 1CT 180. On June 18, 2008, it returned guilty verdicts on both counts. 1CT 183-184.

On October 17, 2008, a motion for new trial was filed and denied. 2CT 224-257; 405. Petitioner was sentenced to 365 days in custody on Count 1 and 180 days custody on Count 2, to be served consecutively. 2CT 406-408.

The California Court of Appeal's published decision affirming the conviction was filed on February 22, 2010. It denied petitioner's petition for rehearing on March 10, 2010. On June 22, 2010, the California Supreme Court denied petitioner's petition for review *See* App. 1-51.

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[3] "CT" stands for the clerk's transcript prepared for the appellate court; "RT" stands for the reporter's transcript volume and page of the trial proceedings.

B. Statement of Facts. *See* App., pp.3-12. Petitioner was prosecuted for alleged misconduct while a police officer with the Maywood Police Department in the Los Angeles area. On May 13, 2004, then Officer Singleton took Jose Bernal into custody. Bernal was placed under lawful arrest for battering a neighbor. Petitioner arrived at the scene with his trainee, Joseph Densmore. Bernal was placed in petitioner's police vehicle to be taken to the nearby jail and booked. Bernal was abusive and threatening at the scene of his arrest.

On the ride to the police station, petitioner had no interaction with Bernal other than driving the police car. Yet, Bernal spit on petitioner as they arrived at the police station. At the car entry at the police station, the prosecution version was that Bernal suddenly became compliant and acquiesced to petitioner's moving him from the police vehicle toward the jail's entrance door for processing. Petitioner testified that Bernal was unruly as he tried to take him to the jail. He received no help in handling Bernal from trainee Densmore who acted like a spectator after they arrived at the police station. Petitioner had ordered Densmore to "grab him" (Bernal), but petitioner testified Densmore rendered little or no assistance to him.

Petitioner allegedly battered the handcuffed Bernal by pushing him head first into a wall near the entrance door to the police station and then writing a false report about the incident. This was the version as testified by Densmore. Petitioner testified Bernal was physically resisting his efforts to control him as he tried to move him to the jail entrance. Due to Bernal's jostling, they both lost their balance and fell into the wall where petitioner

himself sustained documented minor injuries. Bernal was momentarily rendered unconscious. Immediately after the incident, petitioner harshly admonished Densmore for his failure to help him move Bernal to the jail entrance.

The first jury to hear the case hung 9-3 for acquittal. App., 2. The second jury convicted. The evidentiary difference in the two prosecutions was private investigator, Mr. Weldon. He was the State's "use of force" expert in the second trial. Weldon was called to say that a video of the movement of Bernal from the police car until he went off camera demonstrated that petitioner had control of Bernal as he pushed and pulled Bernal toward the station entrance. The camera did not record when the two went into the wall as that area was physically beyond the scope of the recorder's view.

SUMMARY OF ARGUMENT

This case involves the question of how to implement the protections of *Garrity v. New Jersey,* 385 U.S. 493 (1967), where this Court held that the questioning of public employees and their mandatory responses under threat of discharge deprived the employee of free choice to admit, deny, or refuse to answer questions. From *Garrity* came the rule that statements given under such circumstances could not be used outside the employment investigation because they were coerced.

When the interrogator in such a *Garrity* context thereafter testifies in a criminal trial against the person he interviewed, *Kastigar*'s case progeny has held that while the interrogator is not absolutely prohibited from such testimony, the prosecution has a "heavy burden" to prove that such

testimony is "wholly independent" of the compelled statement.

The issue presented is what standard of review is to be applied to the trial court's decision to allow the investigator who took the compelled statement to testify. The Opinion stated the review standard as follows:

> Under *Kastigar*, the prosecution must make an affirmative showing that the evidence in question is, in fact, derived from sources independent of the compelled statement; the prosecution cannot carry its burden simply by asserting the existence of an independent source. [Citations]. As "[t]he particular proof that will satisfy the government's 'heavy burden' . . . will vary from case to case," the adequacy of the prosecution's showing must be assessed in light of the circumstances surrounding the proffered evidence. [Citation]. *Provided that the trial court has applied correct legal principles, we review a finding that the prosecution has carried its burden for the existence of substantial evidence. [Citations.]*
>
> App., 15-16. Italics added.

As will be shown, review of whether the prosecution carried its burden must be *de novo*, and not under a deferential "substantial evidence" standard which the Opinion notes is equivalent to federal "plain error" review. App., 16.

It has been said that the standard of review for mixed questions of law and fact lack clarity.

This Court has defined mixed fact-law questions as those in which "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). The Court also noted that while it has usually reviewed mixed questions independently, its precedents are not entirely consistent and there is support in its decisions for clearly erroneous review for some mixed questions. *See* Warner, "All Mixed Up About Mixed Questions," 7 J. App. Prac. & Process 101 (2005).

This Court has determined certain constitutional mixed questions require *de novo* review and such considerations apply to this issue. In *Ornelas v. U.S.*, 517 U.S. 690 (1996), the Court applied a *de novo* review standard to the question of reasonable suspicion and probable cause findings. It held that "[a] policy of sweeping deference would permit, 'in the absence of any significant difference in the facts,' 'the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause.' [Citation]. Such varied results would be inconsistent with the idea of a unitary system of law. This, if a matter-of-course, would be unacceptable." *Id.*, at 697.

Further, because "[i]ndependent review is... necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Ibid.* In *Miller v. Fenton*, 474 U.S. 104, 114 (1985), the Court

held that the issue of the voluntariness of a confession would be reviewed *de novo* because the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case, [and] the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law."

The same considerations apply to a *Kastigar* issue where trial testimony by a potentially tainted witness must be found "wholly independent" of prior immunized statements. Indeed, the prohibition on use of such statements is "comprehensive" barring even use of compelled testimony as an "investigatory lead," or as the focus of an investigation on a witness. *Kastigar, supra* at 460.

Given that the "heavy burden" on the government to prove its evidence is "wholly independent" of immunized statements, a "clearly erroneous" standard is inappropriate to the comprehensive protection at issue. Review of such a finding is, for the policy reasons cited in *Ornelas* and *Miller*, one requiring *de novo* review.

ARGUMENT

I. WHETHER A WITNESS WHO TOOK *GARRITY* IMMUNIZED STATEMENTS IN AN EMPLOYMENT INVESTIGATION MAY LATER TESTIFY AGAINST THE INTERVIEWEE AT A CRIMINAL TRIAL REQUIRES THE PROSECUTION TO PROVE TO THE APPELLATE COURT UNDER A *DE NOVO* REVIEW STANDARD THAT THE TESTIMONY IS "WHOLLY INDEPENDENT" OF THE COMPELLED STATEMENT.

A. The Standard of Review in Assessing Whether *Kastigar*'s "Wholly Independent" Requirement Has Been Met is *De Novo* and Not, as the Opinion Erroneously States, for Plain Error.

The proper standard of review is often the difference in deciding appellate cases. *E.g., U.S. v. Carpenter*, 494 F.3d 13, 33 (1st Cir. 2007) ("the standard of review used could well have a decisive effect on whether or not to grant a new trial"); *U.S. v. Porter*, 409 F.3d 910, 916 (8th Cir. 2005) ("the standard of review is decisive in this case").

By its own terms, a highly deferential standard will very likely result in upholding trial court decisions assuming there is some basis in the record for doing so. Often, appellate judges, abiding by such a standard, may believe they would not have ruled as the trial court has done, but the deferential standard of review compels it. Not so with independent review where the appellate court decides the question for itself, while being deferential only to the historical fact-finding of the

trial court. It decides for itself the resolution of the application of facts to controlling legal principles.

As noted, the Opinion relies on a highly deferential standard of review. In California, the substantial evidence test is akin to the federal standard for assessing plain error or the clearly erroneous test; that is, quite deferential to the trial court's ruling. App., 16. It means only the existence of "'relevant evidence that a reasonable mind might accept as adequate to support a conclusion....'" *Hosford v. State Personnel Bd.,* 141 Cal.Rptr. 354, 356 (1977), quoting *Gubser v. Department of Employment,* 76 Cal.Rptr. 577, 581 (1969). It is evidence that is credible and of solid value from which a rational trier of fact could have made its finding. *People v. Bloom,* 774 P.2d 698, 705 (1989).

The critical issue was whether the prosecution showed that Weldon's testimony was "wholly independent" of the immunized statement he took from petitioner during the IA investigation. That question cannot be resolved, as the Opinion holds, by saying the trial court recognized *Kastigar*'s rules and that its finding of independence must be upheld if there is any substantial evidence to support it. The Opinion overlooked the essential third step in the review process. The issue is one for the independent determination of the appellate court. It cannot be resolved by merely stating the trial court understood *Garrity* and *Kastigar* and that there was substantial evidence that Weldon obeyed a court instruction to not consider the immunized statements he previously had taken for his IA report, a report involving the same issues as the criminal case.

To be sure, a canvas of cases has a number of them cryptically saying that a trial court finding that the prosecution has met its *Kastigar* burden is to be reviewed under the clearly erroneous standard. *See, e.g., U.S. v. Montoya*, 45 F.3d 1286, 1291 (9th Cir. 1995) (cited in the Opinion, App.,15); *U.S. v. Bartel,* 19 F.3d 1105, 1112 (6th Cir. 1994); *U.S. v. Overmyer*, 899 F.2d 457, 463 (6th Cir.1990 *U.S. v. Provenzano,* 620 F.2d 985, 1005 (3d Cir. 1980); *U.S. v. Romano,* 583 F.2d 1, 7 (1st Cir. 1978).

These cases deemed the question to be entirely factual, which is incorrect. In another informal immunity case, the appellate court got it right when it stated: "Whether the facts establish a violation of the [immunity] contract is a question of law reviewed *de novo.* [Citation]." *U.S. v. Plummer,* 941 F.2d 799, 803 (9th Cir. 1991); *accord U.S. v. Dudden*, 65 F.3d 1461, 1467 (9th Cir.1995) ("We interpret informal immunity agreements using ordinary contract principles.... The standard of review of the district court's denial of Dudden's motion is the same as in civil contract cases: we review factual determinations for clear error, and we review *de novo* whether the facts show a violation of the contract.") *See also U.S. v. McDaniel,* 482 F.2d 305, 311 (8th Cir. 1973) (despite a trial court hearing and "voluminous reports, which we have examined, may have afforded proof of an independent source of the evidence...such reports nevertheless fail to satisfy the government's burden"); *U.S. v. Williams*, 809 F.2d 1072, 1082 (5th Cir. 1987), where the court, without articulating the standard, gave *de novo* review by itself examining the *in camera* presentation produced at trial and finding the "evidence presented, such as it was,

came wholly from other sources."

The appropriate review standard in a *Kastigar* taint review involves three steps: 1) establish the historical facts; 2) select the applicable rule of law; and then 3) assess the application of law to the facts to determine whether the rule of law is violated. Because the third step is the crucial one to decide whether the constitutional rule of law has been violated, that determination must be made under the plenary standard of independent appellate review. Decisions of this Court make clear *de novo* review is essential for such cases.

Examination of the above three steps and cases of the Court demonstrates why *de novo* is the proper standard:

1. The Historical Facts. The undisputed facts are that Weldon took an immunized statement from petitioner about the very matter at issue in the criminal trial. In doing so, he testified he evaluated all the evidence including the compelled interview and the video tape. He came to the trial carrying that knowledge and taint. Weldon testified at a hearing outside the presence of the jury, "You have to base conclusions on the totality. You just don't pick and choose what you want to be relevant and whatnot. You have to look at all aspects of the investigation to come to a proper conclusion." 8RT 4935.

In answer to a prosecution question, Weldon testified before the jury that his testimony was in conformance with his views formed in 2004 (when he conducted the IA investigation.) 9RT 5133.

The prosecutor also sent Weldon a redacted version of petitioner's compelled statement prior to

trial after she decided to employ him as a "use of force" expert. 8RT 4934. Compare the erroneous statement at App., 16: "there is no suggestion that the prosecution itself had any contact with appellant's compelled statement or knew its contents." Of course, "the use of immunized testimony -- before the grand jury or at trial -- to augment or refresh recollection **is** an evidentiary use." *U.S. v. North*, 910 F.2d 843, 860 (D.C. Cir. 1990) (bolding added).

The trial court told Weldon he was to testify to his opinions based solely on his experience and viewing of the video tape of petitioner moving Bernal toward the jail entrance. (This was the same tape he examined during the IA investigation.) Weldon said he would do so. 8RT 4935-4937.

Weldon testified before the jury that petitioner was in control of Bernal based on what he saw in the video and "his years of experience." 8RT 4931.

2. The Controlling Law. In *Kastigar v. U.S.* 406 U.S. 441, 460 (1972), this Court stated that the use of compelled testimony as an investigatory lead or in focusing the investigation on a witness is constitutionally barred. "This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." *Ibid.* It is the prosecution's burden to establish that its evidence is not tainted by establishing an independent, legitimate source for the disputed evidence. *Ibid.* This is an "...affirmative duty to prove that the evidence it [the prosecution] proposes to use is

derived from a legitimate source wholly independent of the compelled testimony." *Ibid.*

3. Application of Facts and Law: *Kastigar* Review Must be Conducted *De Novo*.

The appellate court cited the trial court for recognizing *Kastigar* and determining the historical facts, and then found the facts were supported under a deferential standard. But as stated in *Ornelas v. U.S.*, 517 U.S. 690 (1996), such a standard to assess a constitutional issue is improper. Deferential review allows for differing outcomes on the same facts. Such varied results in determining constitutional rights is "inconsistent with the idea of a unitary system of law" and "would be unacceptable." *Id.*, at 697.

As with the similar issue of whether a confession is voluntary,[4] deferential review on appeal is improper. This Court has historically "been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law." *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

While "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the

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[4] Similarly, *Kastigar* review is akin to review for voluntariness. The latter asks whether the statement was coerced and thus violative of Fifth Amendment protections. *Kastigar* review asks whether the self-incrimination protection is violated when the prosecution presents a witness whose testimony is shaped --directly or indirectly-- by immunized testimony. *U.S. v. Schmidgall*, 25 F.3d 1523, 1528-1529 (11th Cir. 1994).

appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine,"[5] that is not the case in this context. *Kastigar* requires the State to meet a "heavy burden" of demonstrating its trial witness is "wholly independent" of a compelled statement. Once the historical facts are established, an appellate court is every bit as capable of deciding the mixed fact-law question as the trial court.

A deferential review of such a mixed fact-law constitutional question demeans the protection *Kastigar* affords, and thus undermines it. *Kastigar* requires the State to prove that it did not use compelled testimony "in any respect" to insure that such testimony "cannot lead to the infliction of criminal penalties on the witness." *Kastigar, supra* at 453. *De novo* review is required to insure compliance with such an important constitutional mandate.

4. Applying *De Novo* Review Demonstrates the Lack of Independence in Weldon's Testimony.

In evaluating the issue *de novo*, the following factors demonstrate that the prosecution did not meet its heavy burden of proving Weldon's testimony was "wholly independent" of the compelled statement he took from petitioner:

a) The historical facts demonstrated that Weldon came to the 2008 trial with his opinion fixed from 2004 based in part on the compelled statement (as Weldon initially testified outside the presence of the jury). The Opinion's statement that Weldon's

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[5] *Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991), *citing Miller v. Fenton, supra* at 114.

"acquaintance with the compelled statement, by itself, does not erect an insuperable barrier to his testimony" (App., p. 16), is not erroneous, even if it is not truly descriptive or reflective of his being the interrogator, assessor and reporter of the compelled statement during the IA investigation. Weldon was far more than merely "acquainted" with the statement. He initiated it, created it, recorded it, and then wrote about it in forming his written conclusions against petitioner prior to trial. Given that history, the prosecution failed to show "that the evidence it intends to introduce in a subsequent criminal proceeding is not tainted by exposure to the compelled statements." *U.S. v. Koon* 34 F.3d 1416, 1431 (9th Cir. 1994).

b) The prosecution went to Weldon for trial testimony because of his 2004 IA opinion based in part on the compelled statement. That "investigatory lead" alone suffices to show the *Kastigar* taint. *Kastigar, supra*, at 460. In doing so, the prosecution knew it had a witness with a pre-determined opinion favorable to its theory.

c) Proper inquiry asks whether Weldon arrived at his trial opinions *before* being exposed to petitioner's immunized statement. The answer to that question is negative. Weldon first reviewed the video during his IA investigation four years prior to trial when he took the compelled statements from petitioner. Thus, he arrived at his opinion about the tape while exposed to and considering the immunized statement. *See U.S. v. Koon*, *supra* at 34 F.3d 1434, where a planned use-of-force prosecution expert, Nichols, "was disqualified as a witness after he testified at the state *Kastigar* hearing that he was exposed to the compelled

statements and that his testimony would be affected by this exposure."

d) Both the prosecutor and Weldon were "exposed" to the statement prior to trial. At the pre-testimonial hearing, petitioner asked Weldon about what documents he had been provided by the prosecution. Defense counsel stated to Weldon: "From just looking over the Deputy District Attorney's shoulder, it – it appears that there is a transcript of the interview of Michael Singleton with that batch of documents, the compel[led] interview. And it appears that the -- only the answers to the questions were stricken but the questions are still there. ¶ [A] I don't know. I didn't... look at it." 8RT 4934.

The prosecution had the compelled statement and sent a redacted version to Weldon prior to the trial. That is explicit use of the compelled statement in the prosecutor's preparations. *See Pillsbury Co. v. Conboy*, 459 U.S. 248, 255-256 (1983): "answers that repeat verbatim or closely track a deponent's testimony are necessarily also 'derived from' and 'tainted by' such testimony. Petitioners therefore find no basis for the distinction made by the Court of Appeals between questions and answers responsive to those same questions. An answer by its very nature is evoked by and responds to information contained in a question." *See also U.S. v. McDaniel,* 482 F.2d 305, 312 (8th Cir. 1973) ("Because the trial court apparently failed to consider the immeasurable subjective effect of the prosecutor's reading of McDaniel's state grand jury testimony, we conclude that the court's finding that the government had fulfilled the burden of proof required by *Kastigar* cannot stand.")

c) That the prosecution's interaction with Weldon prior to trial was without any protection from Weldon's tainted status undermines a conclusion of his testimony being "wholly independent." While he was instructed just prior to his testimony to "erase" his knowledge and reliance on the compelled statement, that does not meet the "wholly independent" standard. As stated in *U.S. v. Danielson,* 325 F.3d 1054, 1074 (9th Cir. 2003): "the government must introduce evidence and show by a preponderance of that evidence that it did not use this privileged information. Specifically, it must show that all of the evidence it introduced at trial was *derived from independent sources, and that all of its pre-trial and trial strategy was based on independent sources.* Strategy in this context is a broad term that includes, but is not limited to, such things as decisions about the scope and nature of the investigation, *about what witnesses to call* (and in what order), about *what questions to ask* (and in what order), about what lines of defense to anticipate in presenting the case in chief, and about what to save for possible rebuttal. The district court did not apply this standard in its post-trial hearing in this case. We remand to permit it to hold an evidentiary hearing at which this standard can be applied." Italics added.[6]

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[6] In *Danielson, supra,* at 1072 and 1074, the government was found to have interfered with Danielson's attorney-client relationship and the matter was remanded for a hearing on the issue of prejudice. There, one Sava obtained and communicated to the prosecution team privileged defense trial strategy information. Part of the

(continued...)

f) Despite allowing the opinion testimony based on Weldon's assurance he would base it only on his view of the tape, during redirect examination in his trial testimony, the prosecutor asked Weldon about his viewing of the video *in 2004* when he formed his initial opinion based in part on the compelled statement: [Q] "And did you form the same opinion [then] that you've told us today? That Singleton had control of the suspect, Bernal...." 9RT 5133. He answered, "yes." *Ibid.*[7]

Weldon's opinion in 2004, as explicitly stated by Weldon during the pre-testimony hearing (8RT 4934-4935, 4936), was based in part on the compelled statement. Merely telling such a witness not to consider his previous taking of a compelled statement is not nearly sufficient to show testimony wholly independent of the compelled statement. *U.S. v. Hampton*, 775 F.2d 1479, 1487 (11th Cir. 1985); *U.S. v. Seiffert,* 463 F.2d 1089, 1092 (5th Cir. 1972).

Weldon's testimony was given in violation of

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[6](...continued)
remand was to explore whether the government could meet its burden to show that the tainted information was not used in any way in Danielson's case; *i.e.,* to not focus the investigation, decide to initiate the prosecution, refuse to plea bargain, interpret evidence, plan cross-examination, or to plan trial strategy.

[7] Compare the erroneous statement in the Opinion, App., p. 21, n. 8: "During the brief redirect examination, Weldon reaffirmed his testimony on direct examination." Given the factual errors in the Opinion, it can also be said that the Opinion's facts are clearly erroneous, thus undermining its ultimate conclusion.

Kastigar's prohibition on direct or indirect use. His opinions were formed in 2004 in part based on the compelled statement. Reviewing the issue *de novo,* it cannot be said that his opinions offered at trial about petitioner's "control" of Bernal in the video were derived from a "wholly independent source" of his compelled interview with petitioner.

CONCLUSION

Because the legal rules for deciding the taint issue under *Kastigar* acquire meaning only through application, "[i]ndependent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Ornelas v. U.S., supra* at 697. It is respectfully requested that the Court grant the petitioner's petition for *certiorari* to resolve the question presented.

Respectfully submitted,

/s/ Charles M. Sevilla

Charles M. Sevilla
Attorney for Petitioner
Michael Joseph Singleton

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,
Plaintiff and Respondent,

v.

MICHAEL JOSEPH SINGLETON,
Defendant and Appellant.

B211975
(Los Angeles
County Super.
Ct. No.BA322369)

FILED
Feb 22 2010
Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County, Marcelita V. Haynes, Judge. Affirmed.

Charles M. Sevilla for Defendant and Appellant.

Lackie, Dammeier, & McGill, APC, and Steven J. Brock, for Peace Officers Research Association of California Legal Defense Fund as Amicus Curiae for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts B through C.4 of the Discussion.

Appellant Michael Joseph Singleton, a former police officer, was charged with assaulting an arrestee and filing a false report about the arrest. He was investigated by his employer and gave a compelled statement, after being advised, pursuant to *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822 *(Lybarger)*, that it would not be used against him in a criminal trial. The prosecutor called David Weldon, the person who investigated the incident, to opine whether appellant had control of the arrestee during a portion of the arrest depicted in a video recording. In the published portion of the opinion we conclude that the testimony did not violate the principles articulated in *Kastigar v. U.S.* (1972) 406 U.S. 441 (*Kastigar*) regarding the treatment of witnesses exposed to compelled statements. We further find that Weldon was qualified to give the limited expert opinion he provided and that appellant was not denied an opportunity to effectively cross-examine him. We affirm.

PROCEDURAL BACKGROUND

On September 4, 2007, an information was filed charging appellant Michael Joseph Singleton in count 1 with assault by a police officer on Jose Bernal (Pen. Code, § 149), and in count 2 with filing a false report (Pen. Code, § 118.1). Appellant pleaded not guilty to the charges. His first trial ended in a mistrial after the jury deadlocked and was unable to reach a verdict, with nine of the jurors having voted to acquit appellant.

Appellant's second trial was also by jury. On June 18, 2008, the jury found appellant guilty as charged. As to count 1, the trial court suspended sentence and placed appellant on formal probation for three years, with the condition that appellant

serve 365 days in the county jail. As to count 2, the trial court sentenced appellant to a consecutive term of 180 days in the county jail.

FACTUAL BACKGROUND

A. *Prosecution Evidence*

1. *Initial Arrest*

On April 1, 2004, Joseph Densmore became a probationary police officer and trainee with the Maywood Police Department. In early May 2004, appellant replaced another officer as Densmore's field training officer. Shortly after 8:00 p.m. on May 13, 2004, appellant and Densmore were driving in a patrol car when they responded to a disturbance involving Jose Uribe and Jose Bernal.

Regarding the disturbance, Uribe testified that when he arrived at his home in Maywood on May 13, 2004, he found Bernal in an angry state and threatening to hit Uribe's son. When Bernal threw punches at Uribe, Uribe dodged the blows, and punched Bernal. With the assistance of another person, Uribe restrained Bernal until the police arrived. According to Uribe, when the police officers appeared, Bernal was initially calm and cooperative, but became profane and violent after being placed in the patrol car. Bernal had only a slightly swollen cheek when the officers left with him in the patrol car.

Bernal testified that he is five feet nine inches tall, and at the time of the incident weighed 235 pounds. Prior to his encounter with Uribe, he drank "[m]aybe two 40 ouncers" of beer. When he discovered that Uribe's son had disturbed some garbage cans, he went to Uribe's residence to complain. There, Uribe's relative placed him in a chokehold while Uribe repeatedly punched him.

According to Bernal, the punches did not cut or injure him. Several police officers arrived, including appellant and Densmore, and arrested Bernal. Bernal became angry when the officers failed to inquire into the misconduct of Uribe's son, and Bernal spat at an officer. He was handcuffed and placed in the rear seat of appellant's and Densmore's patrol car.

The parties stipulated that on May 13, 2004, Uribe placed Bernal under citizen's arrest for battery.[1]

2. *Use-of-Force Incident*

The key prosecution witnesses to Bernal's journey to the police station were Densmore and Bernal. Densmore testified as follows: After he and appellant arrived at the scene of the disturbance, appellant told him to put Bernal in the back seat of the patrol car. Although Densmore had been instructed in the police academy to restrain arrestees with seatbelts, his initial field training officer told him not to follow this practice, and thus Densmore did not apply seatbelts to Bernal. When Densmore put Bernal in the car, Bernal had only minor facial injuries.

While Bernal sat in the car awaiting its departure, he threatened an officer other than appellant or Densmore. Nonetheless, when the car left, Bernal was quiet. After appellant drove the car approximately one-half mile, he accelerated it and applied the brakes, causing Bernal, who was

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[1] The parties also stipulated that before and after the arrest, Bernal had hostile encounters with Maywood Police Department officers other than appellant and Densmore, and that he was convicted of felony burglary in 2004.

handcuffed, to slam into a metal screen shielding the officers, who sat in the front seats. Bernal became upset and swore profusely at the officers. Appellant accelerated and braked the car three or four times.

When the car arrived at the police station, appellant drove toward the sally port -- that is, the prisoners' entrance -- and instructed Densmore to get out and grab Bernal, who was then quiet.[2] After the car stopped, Densmore and appellant placed their guns in the car's trunk, as they were not permitted to carry guns inside the jail. Appellant and Densmore then approached the passenger side of the car, where Bernal was seated. Densmore was not significantly apprehensive about Bernal, who remained handcuffed.

As Bernal stepped out of the car, appellant grabbed Bernal's arm and pushed him up against the station wall. As appellant did so, he angrily criticized Densmore for failing to grab Bernal. While Densmore continued to stand apart, appellant pulled Bernal toward the jail door at a rapid walking pace. According to Densmore, Bernal appeared to be cooperative.

As the pair approached the jail door, appellant increased his pace, placed his forearm on Bernal's neck, and drove Bernal at a downward angle into a wall. Densmore saw no aggressive conduct by Bernal. After Bernal hit the wall, his head bounced back into appellant, and the pair fell to the ground. According to Densmore, Bernal

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[2] The parties entered into a stipulation regarding the dimensions of the sally port area.

appeared to be unconscious. While Bernal was in this state, appellant applied a "carotid restraint" chokehold to him for three seconds, and then punched him.

After appellant stopped and stood up, Bernal remained on the ground, inert and bleeding from his ear and nose. Appellant was upset with Densmore, and said to him, "This does not look good. You got to get in there and get your hands dirty." At appellant's direction, Densmore and appellant dragged Bernal into a sitting position against the wall, and appellant called for paramedics. After approximately five minutes, Bernal regained consciousness. During Densmore's testimony, the jury viewed a video recording from a surveillance camera near the sally port, which captured portions of Bernal's arrival at the station preceding -- but not including -- the moment he suffered his injuries.

Bernal testified as follows: As appellant and Densmore drove him to the station, he angrily complained that he should not have been arrested and spat at appellant, but made no threats. However, by the time the car approached the station's sally port, he had calmed down. When the car stopped, Bernal stepped out of the car at appellant's direction. He engaged in no aggressive conduct toward appellant. Despite Bernal's compliance with appellant's instructions, appellant said, "I didn't tell you to step out of the car," and banged Bernal's head against a wall. Appellant then began to move Bernal toward the jail door. Bernal could remember only that he collapsed on the way to the door, and that he later awoke in an ambulance.

The parties stipulated that medical personnel

who responded to the incident found that Bernal had a nasal fracture and other injuries to his face and head.

3. ***Subsequent Events***

Regarding the events following Bernal's injuries, Densmore testified as follows: When an ambulance transported Bernal to a hospital, appellant accompanied Bernal while Densmore followed the ambulance in their car. Bernal was released from custody at the hospital.

As appellant and Densmore returned from the hospital, appellant asked Densmore, "How are you going to write this report? Because this is your report." When Densmore answered that he intended to describe the incident "exactly how [he] saw it," appellant said, "That's not going to be able to work because we're going to need to justify this force." After Densmore returned to the station, he prepared an accurate incident report. Appellant rejected it and instructed Densmore to use a handwritten description of the incident that appellant provided to Densmore.[3] Densmore prepared another draft of the report, which

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[3] Appellant read the description for the jury. According to appellant, the description stated: "Due to the violent behavior of Bernal and his attempts to injure officers, [appellant] placed Bernal in a Department-approved, academy trained [sic] carotid restraint. Bernal continued thrashing his body from left to right, yelling that he was not going to be arrested. Bernal lunged forward, losing his balance, and fell head[]first, hitting the wall near the detective's door. Bernal appeared to lose consciousness for approximately five seconds. When he gained consciousness, Bernal stopped resisting arrest."

incorporated appellant's description of the incident. According to Densmore, appellant ultimately wrote the final version of the report, which Densmore initialed.

The next day, Densmore sent an e-mail to a supervisor describing appellant's use of excessive force and acknowledging his own falsified report.[4] Sometime later, he identified the false statements in his report to Dave Weldon, a private investigator and former police officer hired by the City of Maywood to investigate the incident.[5]

Maywood Police Department Detective Sergeant Sean Richardson testified that he was shift supervisor on the evening of May 13, 2004. After learning that an arrestee required paramedics, he went to the sally port, where he found Bernal seated next to a wall, with blood on his face and head. When Bernal left in an ambulance, Richardson directed appellant to ride in the ambulance because Bernal had spit at the paramedics and refused medical treatment. Later that evening, Richardson interviewed appellant, who told him that Bernal had struck him with the car's door and then attacked him, leading to a struggle. Appellant prepared and submitted his own use-of-force report, which Richardson approved

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[4] The parties stipulated that the e-mail was ultimately referred to the Maywood Police Department's Chief of Police.

[5] On cross-examination, Densmore stated that in 2000, he stole $350 from an employer. He also testified that two years later, he admitted the theft "on [his] own" and repaid the money.

and initialed. Richardson also approved and initialed the report on the incident submitted by Densmore.

Appellant's use-of-force report stated: "Upon our arrival at the station, I (Michael Singleton) opened the right rear door of the police unit. Bernal quickly jumped out of the vehicle and took an aggressive stance toward me. Bernal planted his feet firmly on the ground about shoulder width apart. Bernal began pulling away from me. Fearing Bernal was attempting to escape, I pulled Bernal toward me and held Bernal against the closest wall. As Officer Densmore and I attempted to escort Bernal to jail, he continued to be very resistant and violent. Bernal began to throw his body weight from side to side in a violent manner, pulling me off balance. Bernal continued to use his body weight to push me off the wall. Bernal began yelling, 'You are not going to take me to jail[,] fuckin' pigs.' Bernal then used his left foot to kick me on the left knee. I placed my right arm around Bernal's upper body to maintain control. During the struggle, Bernal lowered his head, opened his mouth, and attempted to bite my right forearm. Bernal then reared his head back and attempted to 'Head butt' me in the face. Due to the violent behavior of Bernal and his attempt to injure officers, I placed Bernal in a Dept. approved, academy trained, [sic] carotid restraint. Bernal continued thrashing his body from left to right yelling that he was not going to be arrested. Bernal lunged forward, lost his balance, and fell head first hitting the detectives[']' door. Bernal appeared to lose consciousness for approx. 5 seconds. When he regained consciousness, Bernal stopped resisting."

The parties stipulated that at the time of the trial, neither appellant nor Densmore was employed by the Maywood Police Department.

4. ***Weldon's Testimony***

David Weldon testified that he worked as a police officer from 1973 to 1987, when he retired from the Maywood Police Department. During this period, he acquired training and experience in controlling arrestees. Weldon viewed the video recording from the sally port camera and opined that appellant appeared to be in control of Bernal throughout the incident, insofar as it was captured in the video recording. He acknowledged that the video recording was "jerky" and resembled a series of snapshots, and that he could not analyze the events not visible on the video recording.

B. ***Defense Evidence***

1. ***Appellant's Testimony***

Appellant testified as follows: he was five feet seven inches tall, and in May 2004 weighed a little over 200 pounds. He estimated that Bernal then weighed between 260 and 265 pounds. According to appellant, Bernal was hostile at the scene of the disturbance at Uribe's residence and during the drive to the police station. Appellant denied accelerating and braking the patrol car while Bernal was in it.

Appellant testified that he ordered Densmore to grab Bernal when they escorted him from the car to the station, but Densmore did not do so. Although appellant directed Bernal to remain in the car, Bernal stepped out and said that he would not go to jail. Appellant grabbed Bernal and pinned him against a nearby wall, then tried to move Bernal to the station's door. He had trouble controlling

Bernal, who resisted him. As they approached the door, Bernal attempted to "back-kick" appellant, who placed his right elbow on Bernal's neck to apply a control hold. Bernal then tried to bite appellant's arm and "headbutt" him. As a result, the pair lost their balance, and Bernal's head struck the wall. Appellant denied that he applied a control hold or punched Bernal while they were on the ground. He believed that the video recording did not depict the incident accurately because it omitted significant events.

After appellant and Densmore positioned Bernal against the wall, they tried to revive Bernal and called for medical assistance. When Bernal regained consciousness, he was hostile to police officers and medical personnel, and refused medical attention.

Appellant denied directing Densmore to justify appellant's use of force in Densmore's report. He also testified that he saw no version of Densmore's report describing appellant as having rammed Bernal's head into the station wall. Appellant acknowledged that he gave Densmore a written description of the incident, but denied that he "cut and pasted" portions of Densmore's final report into his own report. According to appellant, after Densmore completed his report, appellant wrote his own report and compared it to Densmore's report "as a reference," but "lifted" nothing from Densmore's report.

2. ***Defense Expert Testimony***

Parris Ward, an expert on video analysis, testified that because the video recording was a series of images taken at intervals of 8/10ths of a second, it omitted events that occurred between "the

snapshots."

Carley Ward, a biomechanical engineer, opined that appellant's testimony regarding the events preceding Bernal's injuries was consistent with the location and gravity of the injuries and the images on the video recording. She also opined that Densmore's testimony was inconsistent with the injuries and video recording.

DISCUSSION

Appellant contends the trial court erred in (1) admitting Weldon's testimony, (2) limiting Carley Ward's testimony, and (3) limiting the cross-examination of Densmore. In addition, appellant contends (4) there was instructional error. For the reasons explained below, we discern no reversible error.

A. *Weldon's Testimony*

Appellant challenges Weldon's testimony on several grounds. His principal contention is that the admission of Weldon's testimony contravened the principles established in *Kastigar*. In addition, he contends that Weldon's testimony was inadmissible under Evidence Code section 352 and constituted improper expert testimony.[6]

1. *Kastigar*

Appellant contends the admission of Weldon's testimony contravened his privilege against self-incrimination under the Fifth and Fourteenth Amendments of the United States Constitution. In 2004, the City of Maywood hired Weldon, then a private investigator, to inquire into appellant's conduct regarding Bernal. During the inquiry,

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[6] All further statutory citations are to the Evidence Code.

Weldon required appellant to provide a statement regarding the incident in exchange for a grant of use and derivative use immunity, in accordance with *Garrity v. New Jersey* (1967) 385 U.S. 493 (*Garrity*) and *Lybarger, supra*, 40 Cal.3d 822.[7] Following the investigation, Weldon concluded that appellant had used excessive force and had lied in his use-of-force report. He recommended that appellant be disciplined. At trial, the prosecution called Weldon to provide opinion testimony on a limited subject, namely, whether appellant had control over Bernal during the moments preceding his injuries captured in the sally port video recording. The trial court concluded that Weldon's testimony was admissible because it was grounded exclusively on the recorded images and Weldon's experience as a police officer,

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[7] In *Garrity, supra*, 385 U.S. 493, the United State Supreme Court stated that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." (*Id.* at p. 500.)

In *Lybarger, supra*, 40 Cal.3d 822, our Supreme Court held that during an administrative investigation into potential misconduct by a police officer, the officer must be told that "although he had the right to remain silent and not incriminate himself, (1) his silence could be deemed insubordination, leading to administrative discipline, and (2) any statement made under the compulsion of the threat of such discipline could not be used against him in any subsequent criminal proceeding. [Citations.]" (*Id.* at p. 829.)

divorced from his investigation into appellant's misconduct.

Appellant contends that Weldon's trial testimony was inadmissible in view of his exposure to appellant's compelled statement. For the reasons explained below, we disagree.

a. ***Governing Principles***

When, as here, a police officer is charged with offenses after giving a compelled statement during an administrative inquiry, the prosecution may not use the statement in any manner that contravenes the promise of immunity made to the officer. (*People v. Gwillim* (1990) 223 Cal.App.3d 1254, 1266, 1270-1273 (*Gwillim*).) As explained in *Gwillim*: "In *Kastigar* [, *supra*,] 406 U.S. [at page] 453, the court held that the government can compel testimony from an unwilling witness who invokes the Fifth Amendment privilege against compulsory self-incrimination by conferring 'use and derivative use' immunity upon the witness. Such immunity bars use of the compelled testimony, or of evidence derived therefrom, in subsequent criminal proceedings." (*Gwillim, supra*, 223 Cal.App.3d at p. 1266.)

In so holding, the United States Supreme Court recognized that a criminal defendant attempting to discover violations of the immunity agreement should not be "dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." (*Kastigar, supra*, 406 U.S. at pp. 459-460.) To resolve this problem, the high court devised what the Ninth Circuit has characterized as a "sensible, and highly practical, solution," namely, a rule that "put the burden of showing non-use on the

government." (*U.S. v. Danielson* (9th Cir. 2003) 325 F.3d 1054, 1071 (*Danielson*).) On this matter, the high court held that once the defendant establishes that he has testified under a grant of immunity, the prosecuting authorities "'have the burden of showing that their evidence is not tainted.'" (*Kastigar*, *supra*, 406 U.S. at p. 460, quoting *Murphy v. Waterfront Comm'n* (1964) 378 U.S. 52, 79, fn. 18.) The high court explained that this burden of proof -- which it described as "heavy" -- requires a showing that "all of the evidence [the prosecution] proposes to use is derived from a legitimate source wholly independent of the compelled testimony." (*Kastigar*, at pp. 460-462.)

The term "heavy" primarily concerns the scope of the requisite showing, rather than the applicable evidentiary standard, as "the prosecutor need show only by a preponderance of the evidence that the evidence adduced against defendant is derived from legitimate independent sources." (*Gwillim*, *supra*, 223 Cal.App.3d at p. 1266; *U.S. v. Montoya* (9th Cir. 1995) 45 F.3d 1286, 1292, fn. 6.) Generally, *Kastigar* proscribes "'any use, direct or indirect,' of the immunized statement," provided that the use is "actual," rather than merely "potential." (*Gwillim*, *supra*, 223 Cal.App.3d at p. 1271.) Thus, "[n]egation of all abstract possibility of taint is not necessary." (*U.S. v. Schmidgall* (11th Cir. 1994) 25 F.3d 1523, 1529 (*Schmidgall*).)

Under *Kastigar*, the prosecution must make an affirmative showing that the evidence in question is, in fact, derived from sources independent of the compelled statement; the prosecution cannot carry its burden simply by asserting the existence of an independent source.

(*Danielson, supra*, 325 F.3d at p. 1071; *Schmidgall, supra*, 25 F.3d at p. 1528.) As "[t]he particular proof that will satisfy the government's 'heavy burden' . . . will vary from case to case," the adequacy of the prosecution's showing must be assessed in light of the circumstances surrounding the proffered evidence. (*Danielson, supra*, 325 F.3d at p. 1072.) Provided that the trial court has applied correct legal principles, we review a finding that the prosecution has carried its burden for the existence of substantial evidence. (See *U.S. v. Koon* (9th Cir. 1994) 34 F.3d 1416, 1433, reversed in part on another ground in *Koon v. U.S.* (1996) 518 U.S. 81, 100 [findings reviewed for clear error]; *U.S. v. Gallo* (2d Cir. 1988) 859 F.2d 1078, 1091 [same]; *People v. Jackson* (1992) 10 Cal.App.4th 13, 22 ["[T]here is no practical difference between the federal 'clearly erroneous' test and a substantial evidence standard of review."].)

The focus of our inquiry is on Weldon's trial testimony, as there is no suggestion that the prosecution itself had any contact with appellant's compelled statement or knew its contents. Under *Kastigar*, Weldon's acquaintance with the compelled statement, by itself, does not erect an insuperable barrier to his testimony. As the court explained in *Gwillim*, "a witness's exposure to immunized testimony does not constitute 'an incurable disease . . . . [T]he defendant[']s[] Fifth Amendment rights are not infringed if a witness hears immunized testimony and yet testifies solely to facts personally known to the witness." (*Gwillim, supra*, 223 Cal.App.3d at p. 1272.) Similarly, the Ninth Circuit stated in *Koon*: "Ensuring that the content of a witness's testimony is based on personal knowledge

. . . meets the *Kastigar* requirement that the defendant's compelled statements shall not be used against him in subsequent criminal proceedings." (*U.S. v. Koon, supra*, 34 F.3d at pp. 1432-1433.)

Gwillim and *Koon* provide instructive applications of this principle. In *Gwillim*, a police officer reported her supervising sergeant had sexually assaulted her, which triggered an administrative investigation into the sergeant's behavior. (*Gwillim, supra*, 223 Cal.App.3d 1254.) During the investigation, the officer provided a recorded statement about her version of the events, and later learned information about the sergeant's compelled statement. (*Id.* at p. 1260.) After the sergeant was charged with criminal sexual battery and sexual assault, the trial court dismissed the action, concluding, inter alia, that the officer's exposure to the sergeant's compelled statement irredeemably tainted the prosecution case. (*Id.* at pp. 1263-1264.) The appellate court rejected this conclusion, reasoning the officer's recorded statement provided an adequate basis for establishing that her trial testimony relied exclusively on her percipient knowledge of the underlying events. (*Id.* at pp. 1272-1273.)

In *Koon,* two of the officers charged with offenses arising from the well known Rodney King incident made compelled statements prior to their first trial in state court. (*U.S. v. Koon, supra*, 34 F.3d at p. 1431.) During their second trial in federal court, they objected to the admission of a codefendant's state trial testimony, contending that he had been exposed to their compelled statements before he testified. (*Ibid.*) Following a *Kastigar* hearing, the federal district court found that the testimony

was not tainted by exposure to the compelled statements. (*U.S. v. Koon, supra*, at p. 1433.) In affirming, the Ninth Circuit concluded that the record reflected legitimate independent sources for the testimony, as it disclosed that the codefendant had been a percipient witness to the events to which he testified, and that other information he provided was traceable to sources other than the compelled statements. (*Ibid.*)

Here, Weldon was not a percipient witness to the underlying events, and was presented to offer opinions regarding the events depicted in the video recording. Under *Kastigar,* the prosecution may present opinion testimony from an expert exposed to a compelled statement only when it "can prove that this testimony is derived from a source wholly independent from [the statement]." (*In re Commitment of Harrell* (Wis.App. 2008) 308 Wis.2d 166, 185 [747 N.W.2d 770, 778-779].) We therefore examine whether the prosecution carried this burden.

b. ***Kastigar Hearing and Testimony***

In response to appellant's objection to Weldon's testimony under *Kastigar*, the trial court conducted a hearing into his proposed testimony and its sources. At the hearing, Weldon described his employment as a police officer from 1973 to 1983 and subsequent employment as a private investigator, including his inquiry into Bernal's injuries for the City of Maywood. According to Weldon, he acquired considerable experience dealing with violent arrestees while working as a police officer; he served as a training officer and was familiar with techniques used to control combative arrestees.

Weldon further testified that after completing his investigation into Bernal's injuries, he submitted a report of his conclusions to the City of Maywood. According to Weldon, his determination that appellant had used excessive force and had lied in his own use-of-force report was based on "the totality of [his] investigation," including appellant's compelled statement and the sally port video recording. Regarding his proposed testimony at trial, Weldon stated that the prosecutor had asked him to view the video recording, interpret it solely on the basis of his experience "separated from the Singleton affair," and opine whether, on the frames depicted in the video recording, appellant was in control of Bernal. Weldon testified that he had complied with these restrictions, and concluded that based on his experience and training, the video recording showed appellant to be in control of Bernal during the moments preceding the alleged assault.

When appellant's counsel asked, "And you can separate in your mind and divorce from your thinking while testifying -- you can completely . . . etch-a-sketch all that you learned during the investigation -- the interview of [appellant] and the conclusions that you came to?," Weldon responded that he could. He further testified that he had not reviewed his report in preparation for his testimony, but acknowledged that he remembered its conclusions. He asserted that he could be objective in formulating his opinion and "not rely on previous information." In ruling that Weldon's testimony was admissible, the trial court stated: "I believe that the jury has a right to hear from him. I believe that he's . . . being asked to do nothing more than

the average judge . . . or even jurors are asked to do[, namely] to set aside previous information . . . ."

During Weldon's trial testimony the jury was shown the video recording, which amounts to a series of still images. It captures the moments preceding the alleged assault: it shows the police car arriving at the station; appellant and Densmore leaving the car; appellant escorting Bernal from the car; appellant pressing Bernal against a nearby wall; and appellant moving Bernal along the wall and turning a corner, where they disappear from view. The video recording does not capture the moment when Bernal was injured.

While playing the video recording, the prosecutor asked Weldon to describe what he observed after Bernal left the police car. Weldon testified that Bernal appeared to walk toward the wall himself, and did not appear to be violent or combative. When asked, "Did it appear to you that Officer Singleton had control of this suspect in the manner that he moved him?" Weldon responded, "Yes." When shown subsequent frames, Weldon testified that appellant appeared to be raising Bernal's handcuffed hands behind his back -- a technique used by officers to allow them to gain control of an arrestee.

The prosecutor next questioned Weldon about the images showing appellant and Bernal moving along the wall before they disappeared around the corner. Weldon responded that appellant appeared to walk in front of Bernal, and that Bernal seemed to stumble over a barricade. Weldon also stated that appellant appeared to put his left forearm in Bernal's back as he pushed Bernal over a cigarette ashtray at the building's corner. At the end of the

direct examination, Weldon opined that appellant appeared to be in control of Bernal throughout the moments depicted in the video recording.

During cross-examination, Weldon stated that his opinions were based on what he observed on the video recording. When defense counsel asked Weldon to assume that Bernal had been aggressive and combative, and had jumped out of the police car and adopted a hostile posture, Weldon opined that it could have been a proper police tactic for appellant to pin Bernal against the wall. On further questioning, Weldon reaffirmed his opinion that in the video recording, Bernal appeared to walk to the wall himself, and appellant appeared to have physical control of him. Weldon also opined that if Bernal had been aggressive, Densmore should have assisted appellant.[8]

c. Analysis

We conclude that Weldon's testimony was admissible under *Kastigar*, as the record reflects that Weldon relied on sources independent of appellant's compelled statement. Although Weldon was an opinion witness, not a percipient one, his testimony was narrowly confined to assessing appellant's control over Bernal on the basis of the video images and Weldon's experience as a police officer. As the images and Weldon's experience are independent of the compelled statement, they satisfy the requirements enunciated in *Kastigar* and its progeny. We have carefully reviewed the video recording and Weldon's testimony addressing it, and

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[8] During the brief redirect examination, Weldon reaffirmed his testimony on direct examination.

we discern nothing in the testimony that is not traceable to these independent sources.

Appellant contends the prosecution failed to carry its burden under *Kastigar* because it offered only an assertion of Weldon's "integrity and good faith" to show that he made no use of the compelled statement (*Kastigar*, *supra*, 406 U.S. at pp. 459-460). We disagree. As explained above (see pt. A.1.a, *ante*), the manner in which the prosecution may carry its burden varies from case to case, depending on the evidence at issue.

Here, the independence of Weldon's testimony from the compelled statement was subject to confirmation beyond his assertion of "integrity and good faith" (*Kastigar, supra*, 406 U.S. at pp. 459-460). Although Weldon was not a percipient witness, he was directed to ground his opinions on what he saw on the video recording. The independence of Weldon's testimony, insofar as he described the images, is supported by the fact that he looked at the video recording. (See *Koon, supra*, 34 F.3d at p. 1433.) Moreover, Weldon was required to rely on his experience and knowledge of techniques for controlling arrestees, which he acquired before he was exposed to appellant's compelled statement. A careful examination of his testimony establishes its independence, as every aspect of the testimony was closely tethered to the video images and specific control techniques he had learned as an arresting officer. (See *ibid.*)

Appellant's reliance on several cases is misplaced. In each case, the prosecutor attempted to carry its burden regarding witness testimony by presenting a conclusory showing of independence. (*State v. Gault* (Minn.App. 1996) 551 N.W.2d 719,

723 [trial court properly barred testimony from 12 witnesses potentially exposed to compelled statement when prosecution provided no evidence regarding sources of their testimony]; *U.S. v. North* (D.C. Cir. 1990) 910 F.2d 843, 861-868 [trial court improperly admitted testimony from witnesses who were warned not to rely on compelled statement without assessing independence of sources]; *U.S. v. Hampton* (11th Cir. 1985) 775 F.2d 1479, 1487-1488 [prosecution's conclusory denials that immunized statement was source of evidence presented to grand jury were inadequate to carry prosecution's burden].) As explained above, that is not the situation here. In sum, we find no *Kastigar* error.[9]

2. ***Section 352***

Appellant contends the trial court erred in refusing to exclude Weldon's testimony under section 352. The crux of his argument is that the testimony was excessively prejudicial, as appellant could not cross-examine Weldon about his potential bias -- namely, Weldon's conclusions as Maywood's investigator -- without disclosing the investigation and compelled statement. For the reasons

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[9] While on the facts of this case we find no error under *Kastigar*, we are troubled by the prosecutor's decision to create the potential for such error by electing to call the witness who had taken appellant's compelled statement. A passing familiarity with *Kastigar* and its progeny would counsel against calling a witness exposed to a compelled statement unless the witness were in possession of unique and crucial testimony. Given the relatively generic nature of Weldon's testimony, the prosecutor could and should have secured another witness to opine on the events depicted in the video recording.

explained below, we reject the contention.

"Under [] section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125, italics deleted.)

Generally, the confrontation clause of the Sixth Amendment of the United States Constitution entitles a defendant to engage in "'otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness . . . .'" (*People v. Smith* (2007) 40 Cal.4th 483, 513, quoting *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680.) Nonetheless, not every restriction on a defendant's cross-examination rises to a constitutional violation. (*People v. Ayala* (2000) 23 Cal.4th 225, 301.) "The trial court . . . has a 'wide latitude' of discretion to restrict cross-examination and may impose reasonable limits on the introduction of such evidence. [Citation.] Thus, 'unless the defendant can show that the prohibited cross-examination would have produced "a significantly different impression of [the witness's] credibility" [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment.' [Citation.]" (*People v. Smith*, *supra*, 40 Cal.4th at p. 513.)

Prior to the commencement of trial, defense counsel sought to exclude Weldon's testimony, contending that it would be excessively prejudicial to appellant because effective cross-examination of Weldon would inevitably disclose appellant's compelled statement. Defense counsel argued: "[The prosecutor is] calling a use-of-force expert, and I can't cross-examine him because of the *Garrity* issue. . . . That violates [appellant's] rights." Defense counsel also suggested that the prosecutor had called Weldon because effective cross-examination of Weldon would be problematic. The court deferred ruling on appellant's request to exclude Weldon's testimony pending a *Kastigar* hearing, but made clear that if permitted to testify, Weldon would be instructed not to refer to appellant's compelled statement, and that defense counsel would be free to cross-examine Weldon for bias.

Following the *Kastigar* hearing, the court indicated its inclination to limit Weldon's direct testimony to his observations of the video recording, avoiding any discussion of the results of the investigation: "I'm willing to limit it to [:] . . . 'This is who [I am]. This is what [I've] done. [I've] looked at this video. This is what [I] think' and not allow the people to go into that he . . . made any type of recommendations to Maywood Police or anything like that." Defense counsel argued that in order to challenge Weldon's credibility on cross-examination, he would be compelled to "launch off into the investigation . . . and thereby potentially invite error in terms of Kastigar." The court noted that defense counsel had already elicited testimony that Weldon had been hired to investigate appellant's

conduct and that the investigation had resulted in a final report. The court advised defense counsel that it would limit the prosecution's direct examination of Weldon, but left open the scope of defense counsel's cross-examination. Defense counsel made no inquiry regarding the investigation or its outcome.

We see no error in the trial court's rulings. Before the trial court, appellant argued that effective cross-examination of Weldon would necessitate an inquiry into Weldon's investigation and the existence and contents of appellant's compelled statement. However, eliciting Weldon's potential bias due to his investigation required no disclosure regarding the compelled statement. By the time Weldon testified, the jury knew that Weldon had conducted an administrative investigation that had resulted in a final report. The only additional fact required to suggest a "'prototypical form of bias'" (*People v. Smith*, *supra*, 40 Cal.4th at p. 513) on Weldon's part was that he had reached conclusions unfavorable to appellant during the investigation. No further disclosure about the existence of appellant's compelled statement and its contents was necessary. As the trial court was prepared to allow defense counsel to elicit the requisite additional fact needed to demonstrate potential bias, the trial court did not deny appellant an opportunity for effective cross-examination or burden his rights under *Garrity* and *Kastigar*.

On appeal, appellant contends the admission of Weldon's testimony impermissibly burdened his rights to privacy regarding Weldon's investigation under article I, section 1 of the California

Constitution and Penal Code section 832.7, subdivision (a).[10] He argues that he could establish that Weldon had reached unfavorable conclusions about his conduct only by giving up his privacy interests regarding Weldon's investigation.

Appellant has forfeited this contention. "'It is, of course, "the general rule" . . . "that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal."'" (*People v. Alvarez* (1996) 14 Cal.4th 155, 186, quoting *People v. Benson* (1990) 52 Cal.3d 754, 786, fn. 7 [defendant forfeited evidentiary objection based on confrontation clause].) As appellant raised no specific objection predicated on his privacy rights before the trial court, he has not preserved his contention for appeal. (See *Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1504-1505 [party forfeited evidentiary objection based on federal constitutional privacy rights by failing to raise it before trial court].)

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[10] Subdivision (a) of Penal Code section 832.7 provides: "Peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to [Penal Code s]ection 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to sections 1043 and 1046 of the Evidence Code. This section shall not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office."

3. ***Expert Testimony***

Appellant contends that Weldon's opinions were inadmissible as expert testimony.[11] We disagree. "Opinion testimony may be admitted in circumstances where it will assist the jury to understand the evidence or a concept beyond common experience. Thus, expert opinion is admissible if it is '[r]elated to a subject that is sufficiently beyond common experience [and] would assist the trier of fact.' (Evid. Code, § 801, subd. (a).) Expert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness. [Citation.]" (*People v. Torres* (1995) 33 Cal.App.4th 37, 45, quoting Evid. Code § 801, subd., (a).) Whether an expert should be permitted to opine on a particular subject is consigned to the trial court's discretion. (*People v. Sandoval* (2008) 164 Cal.App.4th 994, 1001.)

Appellant argues that because Weldon purported to ground his testimony on the video recording, his testimony was not beyond the common experience of the jurors. However, as explained above (see pt. A.1.b, *ante*), Weldon did not merely describe the video recording images, but interpreted them as an experienced police officer: he explained control techniques he saw appellant use and opined whether appellant appeared to have control of Bernal. We therefore reject appellant's

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[11] Respondent contends that this contention has been forfeited. However, the record discloses that in admitting Weldon's testimony, the trial court understood that appellant disputed whether Weldon would present proper expert opinion.

contention.

Appellant also suggests that Weldon was not qualified to testify as an expert, as Weldon had resigned as a police officer in 1987 and had no expertise in video analysis. Again, we disagree. "The trial court is given considerable latitude in determining the qualifications of an expert and its ruling will not be disturbed on appeal unless a manifest abuse of discretion is shown. [Citation.] This court may find error only if the witness '"*clearly lacks* qualification as an expert."' [Citation.] Whether a person qualifies as an expert in a particular case depends on the facts of that case and the witness's qualifications. In considering whether a person qualifies as an expert, the field of expertise must be carefully distinguished and limited. [Citation.]" (*People v. Brown* (2001) 96 Cal.App.4th Supp. 1, 36-37, quoting *People v. Hogan* (1982) 31 Cal.3d 815, 852, disapproved on another ground in *People v. Cooper* (1991) 53 Cal.3d 771, 836.)

Although Weldon did not claim to be a use-of-force expert, he testified that he had considerable experience with violent arrestees, was familiar with techniques for controlling arrestees, and had served as a field training officer. Because Weldon's testimony was limited to appellant's control over Bernal during the brief interval depicted in the video recording, the trial court did not err in determining that he was qualified to offer expert opinion on the subject.

B. ***Carley Ward's Testimony***

Appellant contends the trial court improperly limited the testimony from Carley Ward, his expert on biomechanical engineering. In our view, he is

mistaken.

Ward testified that as a biomechanical engineer, she relied on the laws of physics to determine the causes of injuries to the human body. After she opined that Bernal's injuries were consistent with appellant's testimony, defense counsel asked her to explain the basis of her opinion by reference to the images on the sally port video recording. In interpreting the images, Ward testified that appellant was "trying to pull" Bernal in one image, and "attempting to push" Bernal in another image. The trial court sustained objections to this testimony, ruling that Ward lacked expertise regarding what appellant "[was] attempting to do." Following a hearing on this matter, the trial court ruled that Ward would be permitted to testify only about the "biomechanical movements" disclosed in the images.

Appellant argues the trial court's ruling on Ward's testimony cannot be reconciled with its admission of Weldon's testimony. He notes that Weldon was permitted to testify that Bernal appeared to walk from the police car to the wall by himself; that appellant later pulled Bernal and then pushed him; and that appellant exercised control over Bernal during the moments depicted in the video recording.

We see no error in the trial court's ruling regarding Ward's testimony. As explained above (see pt. A.3., *ante*), Weldon was qualified as an expert regarding the control of arrestees. As such, he was entitled to testify regarding the use of pushes, pulls, and other control techniques by police officers, and the objective manifestations of compliance or resistance by arrestees. In contrast,

Ward had no expertise in these areas: she testified that as a biomechanical engineer she studied "the human body and why it's damaged in a dynamic event such as [an] accident or a fall." Nothing in Ward's qualifications suggested that she had special knowledge beyond the common experience of the jurors about the conduct of an arrestee or appellant's conduct as a police officer.

C. ***Densmore's Cross-Examination***

Appellant contends the trial court erred in limiting Densmore's cross-examination under section 352. He argues that his counsel was improperly denied an opportunity to impeach Densmore with a declaration that Densmore submitted in a civil action arising from the underlying incident. For the reasons explained below, we reject this contention.

As our Supreme Court explained in *People v. Mayfield* (1997) 14 Cal.4th 668, 748, "[t]o determine the credibility of a witness, the trier of fact may consider, among other things, '[t]he existence or nonexistence of any fact testified to by' the witness. (§ 780, subd. (i).) . . . [T]he trial court has discretion to admit or exclude evidence offered for impeachment on a collateral matter [citations]." Thus, the trial court may properly exclude testimony offered to impeach a witness on essentially irrelevant matters. In *People v. Lavergne* (1971) 4 Cal.3d 735, 738-741, the defendant was charged with robbery of a store, and his accomplice testified against him at trial. During cross-examination, the accomplice stated that he had bought the escape car; the trial court excluded, under section 352, testimony of a defense witness intended to show that the accomplice had stolen the

car. (*Lavergne*, at p. 741.) The appellate court affirmed the ruling, concluding that the proffered testimony was collateral to the facts at issue in the trial. (*Id.* at pp. 742-743.)

During appellant's first trial, Densmore testified that as a trainee, he was never informed that he had a duty to report misconduct by a police officer. Prior to the second trial, appellant sought leave to cross-examine Densmore regarding his declaration in a "whistleblower" civil action that he had initiated against the City of Maywood. In the declaration, Densmore stated that he had reported "the Singleton/Bernal incident [] as a concerned citizen who wanted to do the right thing." Appellant contended that Densmore had falsely asserted that he made the report as a citizen, rather than as a police officer, to avoid a legal barrier to "whistleblower" actions by police officers. Appellant thus argued that the statement was relevant to Densmore's credibility as a witness against appellant.

At the hearing on appellant's request, his counsel maintained that the statement showed that the account Densmore had offered during the first trial for his delay in reporting appellant's misconduct -- namely, that he was unaware of any duty to report misconduct -- was false. Defense counsel argued that Densmore had tailored his trial testimony to preserve his civil action. In ruling, the trial court permitted defense counsel to ask Densmore whether he was aware that his trial testimony had to be "consistent" with his civil action, but otherwise denied the request. The trial court stated that the excluded portion of the requested cross-examination was "somewhat

probative," but that establishing the significance of Densmore's statement for the viability of his civil action would be "confusing and misleading to the jury." The trial court concluded that "the probative value is outweighed by the effect of confusing the jury over those issues."

In our view, the trial court acted well within its discretion. Although the proposed cross-examination had some bearing on Densmore's credibility, it was on a matter collateral to the facts at issue, and threatened to divert the jury's attention to legal issues remote from the charges against appellant. There was no error.

D. ***Instructions***

Appellant raises numerous challenges to the instructions provided to the jury at his trial. As explained below, we discern no reversible error.

1. ***Instructions Regarding Assault by a Police Officer***

We begin with appellant's challenges to the instructions regarding assault by a police officer. Generally, the adequacy of any instruction given must be judged in the context of all the instructions. (5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 663, pp. 953-954.) Thus, an instruction is not assessed in isolation, but must be viewed in the context of the overall charge. *(People v. Reliford* (2003) 29 Cal.4th 1007, 1013.) When an instruction is potentially ambiguous or misleading, the instruction is not error unless there is a reasonable likelihood that the jurors misunderstood or misapplied the pertinent instruction. (*Ibid.*; *People v. Avena* (1996) 13 Cal.4th 394, 416-417.)

Regarding assault by a police officer, the jury was instructed that the prosecution was obliged to

prove that appellant was a public officer who "assaulted or beat [] [Bernal]" and "acted without lawful necessity."
The instruction on assault (CALCRIM No. 915) informed the jury that the prosecution had to demonstrate, inter alia, that appellant "did an act that by its nature would directly and probably result in the application of force to a person," and that appellant "did that act willfully." The instruction on assault further stated: "Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage."

Regarding assault, the jury also received an instruction regarding the requisite intent. CALCRIM No. 250 stated: "The crime[] . . . require[s] proof of the union, or joint operation, of act and wrongful intent. [¶] For you to find a person guilty of the crime[] . . . , that person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act[;] however, it is not required that he or she intend to break the law."

The jury received instructions informing it that an officer may not use "unreasonable or excessive force in making or attempting to make an otherwise lawful arrest" (CALJIC Nos. 16.106, 16.107, and 16.111), and that offensive words are insufficient to justify an assault (CALCRIM No. 917).[12] In addition, the jury received an

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[12] CALJIC No. 16.106, as provided to the jury, stated: "A (continued...)

[12](...continued)
peace officer who is making an arrest or detention may use reasonable force to make the arrest or detention, or to prevent escape, or to overcome resistance. [¶] The officer need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested or detained. [¶] Where a peace officer is making an arrest or detention, and the person being arrested or detained has knowledge, or by the exercise of reasonable care should have knowledge, that he is being arrested or detained by a peace officer, it is the duty of that person to refrain from using force or any weapon to resist the arrest or detention unless unreasonable or excessive force is being used to make the arrest or detention."

CALJIC No. 16.107, as provided to the jury, stated: "A person may not use passive resistance or interpose any obstacle which in any manner impedes, hinders, interrupts, or delays a lawful arrest. A person who becomes intentionally inert or limp and thereby requires that he be dragged or lifted bodily to make an arrest is passively resisting arrest."

CALJIC No. 16.111, as provided to the jury, stated: "A peace officer is not permitted to use unreasonable or excessive force in making or attempting to make an otherwise lawful arrest or in detaining or attempting to detain a person for questioning. [¶] If an officer does use unreasonable or excessive force in making or attempting to make an arrest or in detaining or attempting to detain a person for questioning, the person being arrested or detained may lawfully use reasonable force to protect himself."

CALCRIM No. 917, as provided to the jury, stated: "Words, no matter how offensive, and acts that are not threatening, are not enough to justify an assault or battery. [¶] However, if you conclude that Bernal spoke or acted in a way that threatened [appellant] with immediate harm or

(continued...)

instruction derived from *Graham v. Connor* (1989) 490 U.S. 386, 396-397 (*Graham* instruction), stating: "In determining whether force used during an arrest or detention is reasonable you must weigh the force used against the need for the force. [¶] Some of the factors to be used in measuring the need for force include: [¶] 1. The severity of any crime the person may have committed; [¶] 2. Whether the person arrested poses an immediate threat to the safety of the officer or others; [¶] 3. Whether the person is actively resisting arrest or attempting to evade arrest by flight. [¶] The standard in excessive force cases is an objective one. The question is whether the officer's actions were objectively reasonable in light of the facts and the circumstances confronting him, without regard to his underlying intent or motivation. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation."

Appellant attacks these instructions on several related grounds. He argues that the terms "lawful necessity" and "excessive force" were inadequately defined for the jury; in addition, he maintains that the instructions failed to inform the jury that assault by a police officer required a

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[12](...continued)
an unlawful touching or great bodily injury, you may consider that evidence in deciding whether [appellant] acted in self-defense or defense of others."

finding of excessive force. We disagree. "A trial court is not obliged to condense the required explanation of a legal rule or concept in a single instruction; a charge is not erroneous or prejudicial simply because a required explanation is given in two instructions rather than one. [Citation.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 649.) Although the instructions do not expressly define the term "lawful necessity," the instructions informed the jury that in arresting and detaining Bernal, appellant was not permitted to use "excessive or unreasonable force"; in turn, the *Graham* instruction stated the standard for determining whether appellant had employed excessive force, which is explained in terms of the application of reasonable force.

Appellant also contends that the instructions improperly conflated unreasonable force with excessive -- that is, unlawful -- force. Pointing to *People v. Colantuono* (1994) 7 Cal.4th 206 (*Colantuono*), he argues that the application of unreasonable force may be negligent conduct, and that mere negligence is not a basis for assault. In our view, the instructions do not suggest that a simple application of unreasonable force suffices to establish the offense. The *Graham* instruction addresses only one aspect of the offense, namely, whether the officer -- for whatever reason -- used excessive force, as judged by reference to a reasonable police officer. The instructions also inform the jury that beyond the application of excessive force, the offense requires a mens rea. On this matter, they closely track *Colantuono*, in which our Supreme Court determined that assault is a general intent crime, and described the mens rea

necessary for it. (*Colantuono*, at p. 214.)

Finally, appellant contends the instructions were likely to confuse the jury regarding the requisite mens rea. He argues that because the *Graham* instruction enjoined the jury to set aside the defendant's "underlying intent or motivation," in assessing the existence of excessive force, the instructions invited the jury to disregard the pertinent mens rea. In our view, he is mistaken. The instructions, viewed as a whole, fully conveyed the need to determine whether appellant acted with the appropriate state of mind. We see no reasonable likelihood that they misled the jury.

2. ***Unanimity Instructions***

Appellant contends the trial court erred in failing to provide unanimity instructions sua sponte with respect to both offenses charged against appellant. He argues that the trial court was obliged to instruct the jury that it must unanimously agree upon the precise act that constituted appellant's assault on Bernal, and the precise statement in appellant's use-of-force report that was materially false.

The trial court may be required to give a special unanimity instruction sua sponte in some circumstances. (*People v. Jenkins* (1994) 29 Cal.App.4th 287, 298-299.) However, no such instruction is required when the case falls within the so-called "continuous course of conduct exception." (*Id.* at p. 299.) This exception is applicable "'when the acts are so closely connected that they form part of one and the same transaction, and thus one offense. [Citation.]'" (*Id.* at p. 299, quoting *People v. Thompson* (1984) 160 Cal.App.3d 220, 224.)

Instructive applications of this exception are found in *People v. Robbins* (1989) 209 Cal.App.3d 261 (Robbins), *People v. Flores* (2007) 157 Cal.App.4th 216 (*Flores*), and *People v. Dieguez* (2001) 89 Cal.App.4th 266 (*Dieguez*). In *Robbins*, the defendant entered the home of an elderly woman, sexually abused her, and physically injured her. (*Id.* at pp. 263-264.) He was convicted of two counts of forcible oral copulation and one count of sexual penetration by force. (*Ibid.*) In addition, the jury found that he had inflicted great bodily injury in the commission of each offense. (*Ibid.*) On appeal, the defendant argued that the jury should have been instructed that it must unanimously agree on the injuries that the woman suffered in connection with each count. (*Id.* at p. 264.) The appellate court rejected this contention, reasoning that the defendant's attack "was one prolonged assault, of which the individual blows and other indignities were inseparable components." (*Id.* at p. 266.)

In *Flores*, the defendant fired several gunshots at a house and parked car, and later told police that he had fired most of the shots into the air. (*Flores*, *supra*, 157 Cal.App.4th at p. 219.) After a jury found him guilty of assault with a deadly weapon, he argued that he was entitled to an instruction directing the jury to agree on the act that constituted the assault. (*Id.* at p. 222.) The appellate court rejected the contention on the basis of the exception for continuous course of conduct. (*Id.* at pp. 222-223.)

Finally, in *Dieguez*, the defendant was convicted of making a false worker's compensation claim. (*Dieguez, supra,* 89 Cal.App.4th at pp.

270-271.) Although the defendant had made false statements on several dates, the prosecutor told the jury that the charge relied exclusively on the defendant's meeting with a doctor, during which the defendant provided a detailed description of his purported complex of injuries. (*Id.* at p. 275.) When the defendant contended that the jury should have been instructed that it must agree on the precise statement to the doctor that constituted the basis for the conviction, the appellate court disagreed, reasoning that the defendant's statements to the doctor were interrelated and "closely connected in time and purpose." (*Id.* at pp. 274-276.)

In view of this authority, the trial court was not obliged to provide unanimity instructions in connection with the two charges against appellant. Appellant's behavior toward Bernal amounted to a single course of conduct, as did appellant's report on the incident involving Bernal.[11] There was no

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[11] Moreover, as respondent notes, the prosecutor's closing argument left no doubt as to the conduct the people were relying on to prove the assault, viz., appellant's act of ramming Bernal head first into the wall so forcefully that he lost consciousness: "And I'll tell you right now I have no problem [with] what's seen in the video. I don't think that's excessive. I think [appellant] took Bernal out of that car and showed him who was in control, and I think he was able to get Bernal to do everything he wanted. *That's not the issue. We all know that the issue is what happened when they turned the corner* . . . ." (Italics added.) In addition, the prosecutor argued: "[N]obody will stand up here and say that there's anything that is going to justify a person handcuffed behind their back, a person that is unable to break their fall in any way or maintain their

(continued...)

instructional error.

3. ***Accomplice Instructions***

Appellant contends the trial court erroneously denied his request for accomplice instructions. He argues the jury could properly have found that Densmore was an accomplice with respect to the offense of filing a false police report. We disagree.

Under Penal Code section 1111, a defendant may not be convicted "upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense . . . ." As Witkin and Epstein explain: "[W]here the prosecution relies on accomplice testimony, the defendant is entitled to an instruction to this effect. [Citations.] The instruction must be given on the court's own motion." (5 Witkin & Epstein, *supra*, Criminal Trial, § 654, p. 941.)[14]

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[13](...continued)
balance with their arms, bein[illegible] pushed directly into the wall as a form of punishment for their previous behavior. . . . If that is an intentional act, that is excessive force. If you find that [*appellant*] *pushed him, drove him, rammed him, pick an adjective, into that wall* because Bernal was being a jerk, because Bernal was spitting on him, that is excessive force." (Italics added.) As the prosecutor clearly identified the precise conduct that allegedly constituted the assault, a unanimity instruction was unnecessary. (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292.)

[14] CALCRIM No. 334 defines the term "accomplice," and CALCRIM No. 335 states the requirement for corroboration of accomplice testimony and advises the jury to view such
(continued...)

The trial court is obliged to give accomplice instructions only when there is evidence to support a determination that the witness in question was, in fact, an accomplice. (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1158-1159.) "'For instructional purposes, an accomplice is a person "who is liable to prosecution for the *identical offense* charged against the defendant on trial in the cause in which the testimony of the accomplice is given." [Citations.]' [Citation.] 'In order to be an accomplice, the witness must be chargeable with the crime as a principal [citation] and not merely as an accessory after the fact [citations]. [Citation.]' [Citation.] Principals include those who 'directly commit the act constituting the offense' as well as those who 'aid and abet in its commission . . . .' [Citation.]" (*People v. Felton* (2004) 122 Cal.App.4th 260, 267-268.)

Here, the false police report that appellant was charged with filing was his *own* use-of-force report. The record is devoid of evidence that Densmore played any role in the preparation and filing of appellant's report. Although Densmore and appellant provided conflicting testimony regarding the extent to which appellant created Densmore's report, neither suggested that Densmore assisted in the creation of appellant's report. Accordingly, the trial court properly rejected appellant's request for accomplice instructions.

4. ***Instructions Regarding Defenses***

Appellant contends the trial court inadequately instructed the jury on the defenses of

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[14](...continued)
testimony with "caution."

accident and self-defense. For the reasons explained below, we discern no reversible error.

As our Supreme Court has explained: "'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citations.] Included within this duty is the '. . . obligation to instruct on defenses, . . . and on the relationship of these defenses to the elements of the charged offense . . .' where '. . . it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense . . .' [Citation.]" (*People v. Stewart* (1976) 16 Cal.3d 133, 140.)

Here, appellant testified that Bernal's injuries resulted from an accidental fall that occurred when appellant tried to defend himself from Bernal's aggressive conduct. As appellant asserted a combination of the defenses of accident and self-defense, the trial court was obliged to provide adequate instructions on its own initiative explaining "'the general principles of law . . . necessary for the jury's understanding'" of each defense. (*People v. Stewart*, *supra*, 16 Cal.3d at p. 140; see *People v. Jones* (1991) 234 Cal.App.3d 1303, 1314 [trial court must instruct sua sponte on accident when defendant relies on it]; *People v. Villanueva* (2008) 169 Cal.App.4th 41, 49 [trial court must instruct sua sponte on self-defense when defendant relies on it].) However, no instruction

referring to the defense of accident was provided to the jury. Moreover, the instructions contained limited express references to self-defense. The jury was instructed with CALCRIM No. 915, which stated that to establish an assault, the prosecution was required to show that appellant "did not act in self-defense or in defense of someone else." In addition, the jury was instructed with CALCRIM No. 917, which stated: "[I]f you conclude that [] Bernal spoke or acted in a way that threatened [appellant] with immediate harm or an unlawful touching or great bodily injury, you may consider that evidence in deciding whether [appellant] acted in self-defense or defense of others."

We nonetheless conclude the errors were not prejudicial. The courts are divided over whether error of this kind is examined for prejudice under the test in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), or the more stringent beyond-a-reasonable-doubt test found in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). (*People v. Corning* (1983) 146 Cal.App.3d 83, 89 [failure to instruct on accident is *Watson* error]; *People v. Jones*, *supra*, 234 Cal.App.3d at p. 1316 [failure to instruct on accident is subject to *Chapman* test]; *People v. Elize* (1999) 71 Cal.App.4th 605, 616 [concluding that failure to instruct on self-defense was prejudicial under both tests, without identifying applicable test]; *People v. Villanueva*, *supra*, 169 Cal.App.4th at p. 53 [failure to instruct on self-defense is Watson error].) In our view, the errors were harmless, regardless of the applicable standard, as the jury received adequate guidance on the defenses from other instructions and other sources (see *People v. Jones*, *supra*, 234

Cal.App.3d at pp. 1314 to 1316).

We begin with the omitted instructions on accident. Had the jury received CALCRIM No. 3404, which explains the defense, it would have been informed: "The defendant is not guilty of [assault] if [he] acted without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of [assault] unless you are convinced beyond a reasonable doubt that [he] acted with the required intent." As at least one court has observed, the principle stated in this instruction is "self-evident." (*People v. Corning*, *supra*, 146 Cal.App.3d at p. 89.) Thus, in *People v. Jones*, *supra*, 234 Cal.App.3d at pages 1314 to 1316, the court concluded that the trial court's failure to instruct on accident was harmless under the demanding *Chapman* test when the jury was properly instructed on the intent required for the charged offense, and the jury found the defendant guilty as charged and made special findings regarding intent.

We reach a similar conclusion here. As explained above (see pt. D.1, *ante*) the jury was properly instructed on the intent required for assault, and was also informed that "the People [must] prove a defendant guilty beyond a reasonable doubt" (CALCRIM No. 220). In addition, during the closing arguments, the prosecutor emphasized that appellant's assertion that Bernal's injuries resulted from a fall against a wall was inconsistent with the prosecution's theory of the case, namely, that appellant had intentionally shoved Bernal into the wall. The prosecutor argued: "Basically, you can't fall if you're pushed. . . . [It's t]he common meaning of the word. I'm not falling if [someone] comes up

behind me and pushes me forward and my hands are behind my back . . . . That's a push, that's an intentional act, and that is [] excessive force." Under these circumstances, the failure to instruct the jury with CALCRIM No. 220 was harmless beyond a reasonable doubt.

Pointing to *People v. Acosta* (1955) 45 Cal.2d 538 (*Acosta*) and *People v. Gonzales* (1999) 74 Cal.App.4th 382 (*Gonzales*), appellant contends that the omitted instruction on accident was prejudicial. His reliance on these cases is misplaced. In *Acosta*, the court concluded that the absence of an accident instruction was prejudicial even though the jury had been instructed on the intent required for the charged offenses, reasoning that the accident instruction was needed to direct the jury's attention "to the possible, reasonable view of the evidence urged by [the] defendant." (*Acosta*, *supra*, 45 Cal.2d at p. 544.) In contrast with *Acosta*, here the prosecutor directed the jury's attention to the precise factual issue critical to appellant's defense of accident, namely, the possibility that Bernal had fallen. In *Gonzales*, the court concluded that the omission of an accident instruction was prejudicial because the jury unsuccessfully sought guidance about the defendant's accident defense during its deliberations. (*Gonzales*, *supra*, 74 Cal.App.4th at pp. 390-391.) Here, the jury displayed no confusion about the accident defense.

We also conclude that the omission of an express instruction on self-defense was not prejudicial. Had the jury been instructed with CALCRIM No. 3470, it would have been informed about the standards for the reasonable use of force

applicable to self-defense.[15] In our view, the

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[15] CALCRIM No. 3470, as adapted to the instant case, would have stated in pertinent part: "The defendant acted in lawful self-defense if: [¶] 1. The defendant reasonably believed that [he] was in imminent danger of suffering bodily injury [or was in imminent danger of being touched unlawfully]; [¶] 2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger; [¶] AND [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger. [¶] Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of violence to [himself]. Defendant's belief must have been reasonable and [he] must have acted because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful [self-defense]. [¶] When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed. [¶] [The defendant's belief that (he) was threatened may be reasonable even if (he) relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.] [¶] [If you find that (Bernal) threatened or harmed the defendant (or others) in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.] [¶] [If you find that the defendant knew that (Bernal) had threatened or harmed

(continued...)

standards needed for the jury's decision were communicated by the *Graham* instruction and the related instructions regarding the use of force by police officers making an arrest (see pt. D.1., *ante*). Accordingly, the omission of CALCRIM No. 3470 was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

MANELLA, J.

We concur:
EPSTEIN, P. J.
WILLHITE, J.

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[15](...continued)
others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.] [¶] [Someone who has been threatened or harmed by a person in the past is justified in acting more quickly or taking greater self-defense measures against that person.] [¶] . . . [¶] [A defendant is not required to retreat. [He] . . . is entitled to stand his . . . ground and defend himself and, if reasonably necessary, to pursue an assailant until the danger of (bodily injury) has passed. This is so even if safety could have been achieved by retreating.]"

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES DATE PRINTED: 10/17/08
CASE NO. BA322369
PEOPLE OF THE STATE OF CALIFORNIA
vs.
DEFENDANT 01: MICHAEL JOSEPH SINGLETON SR
INFORMATION FILED ON 09/04/07

COUNT 01: 149 PC FEL– ASSAULT BY PUBLIC OFFICER COUNT 02: 118.1 PC FEL– PEACE OFFICER FILING FALSE RPT.

ON 10/17/08 AT 8:30 AM IN CENTRAL DISTRICT, DEPT 134 CASE CALLED ... PARTIES: MARCELITA V. HAYNES (JUDGE) STEPHEN ISAGO (CLERK) LOTUS LUI (REP) MARGO B. BAXTER (DA) DEFENDANT IS PRESENT IN COURT, AND REPRESENTED BY MICHAEL STONE PRIVATE COUNSEL

* * * *

THE DEFENDANT IS SENTENCED: ... AS TO COUNT (01): ... IMPOSITION OF SENTENCE IS SUSPENDED DEFENDANT IS PLACED ON PROBATION FOR A PERIOD OF 003 YEARS UNDER THE FOLLOWING CONDITIONS: SERVE 365 DAYS IN LOS ANGELES COUNTY JAIL... AS TO COUNT (02) IMPOSITION OF SENTENCE IS SUSPENDED DEFENDANT IS PLACED ON PROBATION FOR A PERIOD OF 003 YEARS UNDER THE FOLLOWING CONDITIONS: SERVE 180 DAYS IN LOS ANGELES COUNTY... SENTENCE IS TO RUN CONSECUTIVELY WITH COUNT 1. IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 4

March 10, 2010

Charles M. Sevilla
Cleary & Sevilla
1010 Second Avenue
Suite 1825
San Diego, CA 92101

THE PEOPLE,
Plaintiff and Respondent,

v.

MICHAEL JOSEPH SINGLETON,
Defendant and Appellant.

B211975
Los Angeles County Super. Ct. No.BA322369

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

Court of Appeal, Second Appellate District,
Division Four – No. B211975

S181432

IN THE SUPREME COURT OF CALIFORNIA
En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

MICHAEL JOSEPH SINGLETON,
Defendant-petitioner

The petition for review is denied.

SUPREME COURT
FILED
June 17 2010
Frederick K. Ohlrich, Clerk

Deputy

GEORGE
Chief Justice